Office-Supreme Court, U.S.
FILED
MAY 18 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1825

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1980

FRANK GRACE, et al.,
Petitioners

v.

FRED BUTTERWORTH, et al.,
Respondents.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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ISSUES PRESENTED.

1. Whether there was any constitutional error in a jury instruction which, in the course of defining reasonable doubt made reference to decisions in the jurors private lives and informed jurors of sentencing and parole consequences?

2. Whether the Court of Appeals properly rejected petitioners' contention that the Massachusetts' Supreme Judicial Court's disposition of their case was "so arbitrary and capricious" as to violate Fourteenth Amendment standards?

The respondent does not object to petitioners' citation to Opinions below, Statement of Jurisdiction and Designation of Parties.

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BRIEF FOR THE RESPONDENT IN OPPOSITION.

STATEMENT OF THE CASE

The petitioners, brothers, were tried together in the Bristol Superior Court before a judge and a jury, for the murder of one Marvin Morgan. The jury returned verdicts of first degree murder for Frank Grace and second degree murder for his brother, Ross Grace. Both were sentenced to life imprisonment.

After the petitioners' direct appeal was entered in the Supreme Judicial Court, but before it was heard, the petitioners filed motions for a new trial alleging the existence of newly discovered evidence. The petitioners' motions were denied on February 26, 1975, and the appeals from the conviction as well as from the denial of the motions for new trial were consolidated for review by the Supreme Judicial Court, which, on August 3, 1976, affirmed. Commonwealth v. Frank Grace, 370 Mass. 746, 352 N.E. 2d 175 (1976); Commonwealth v. Ross Grace, 370 Mass. 759, 352 N.E. 2d 183 (1976).

Petitioners subsequently sought relief in the federal court pursuant to 28 U.S.C. §2254. Their application for a writ of habeas corpus was dismissed on March 27, 1978. On November 17, 1978, the order of

the District Court was affirmed by the Court of Appeals for the First Circuit. Grace v. Butterworth, 586 F. 2d 878 (1st Cir. 1978).

While this first application for a writ of habeas corpus was pending, the petitioners filed in the Superior Court a second motion for a new trial alleging that the trial judge's charge to the jury violated their right to due process of law. This motion was denied by the trial judge. That denial was affirmed on September 29, 1978. Commonwealth v. Grace, 376 Mass.____, 381 N.E. 2d 139 (1978). A second application for writ of habeas corpus was filed and denied in the District Court. On February 5, 1980 the First Circuit affirmed. Grace v. Butterworth, 635 F. 2d 1 (1980). On February 19, 1980, petitioners moved for rehearing on the

basis of a decision by the Supreme Judicial Court in Commonwealth v. Garcia, Mass. Adv. Sh. (1980) 21, 399 N.E. 2d 460 (1980).

On June 27, 1980, the Court of Appeals, while retaining jurisdiction, ordered the petitioners to present their new and unexhausted claim, "that the state had, in less than even-handed manner, granted retroactive benefits of its law to one party while capriciously withholding it from another," to the Supreme Judicial Court. Grace v. Butterworth, 635 F. 2d 7

On November 12, 1980, the Supreme Judicial Court, after consideration of petitioners' petition for reconsideration, again affirmed the denial of petitioners' motion for a new trial. Commonwealth v. Grace, Mass. Adv. Sh. (1980) 2345, 412 N.E. 2d, 354. Thereafter in a per curiam opinion the Court of Appeals again affirmed

the district courts' denial of petitioners' petitions for writs of habeas corpus. Grace v. Butterworth, 635 F. 2d at 11.

REASONS FOR NOT GRANTING THE WRIT.

I. THERE IS NO ERROR OF CONSTITUTIONAL DIMENSION IN THE CHARGE ON REASONABLE DOUBT.

A. Reference to Parole Consequences Does Not Constitute Constitutional Error.

Petitioners allege constitutional error by reason of the trial judge's comment upon the differences in punishment for verdicts of first degree and second degree murder.

> "For first degree murder, the sentence is life in prison; and that person is not elibible for parole. He stays there until and unless pardoned by the Governor and the Council.
>
> For second degree murder, the punishment is life in prison; and he is eligible -- I don't say that he will be, but he is eligible for parole in 15 years." (Tr. 1352-1353).

The petitioners objected and excepted at trial, but did not assign it as error or argue the issue on appeal. "Thus, this claim of error [had] been waived" Commonwealth v. Grace, 381 N.E.2d 139, 141 (1978). Therefore, under Wainwright v. Sykes, 433 U.S. 72, 87-91 (1977), (the petitioner having established neither cause nor prejudice) the issue is waived for federal habeas corpus purposes.[1/]

Were the issue deemed to have been preserved, petitioners cite no controlling authority which recognizes such alleged

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1/Petitioners' can hardly argue lack of awareness of the legal issue where they raised the matter at trial and later waived it on appeal. Moreover in Commonwealth v. Ferreira, 364 N.E.2d 1264, 1270-1272 (1977) the Supreme Judicial Court in reversing on a similar instruction made clear its holding was firmly grounded in prior case law. The Court made no mention of reversal being constitutionally required.

error as being of constitutional dimension. Taylor v. Kentucky, 436 U.S. 478 (1978), holding that an instruction on the presumption of innocence is constitutionally required, does not by its terms render reference to parole consequences constitutionally infirm.

B. The Use of Analogies in Defining Reasonable Doubt is not Constitutionally Impermissable.

Under the rule of In Re Winship, 397 U.S. 358 (1970), the prosecution is required to prove a defendant's guilt beyond a reasonable doubt; that burden extends to proof beyond a reasonable doubt of every essential element of the crime charged. Mullaney v. Wilbur, 421 U.S. 684 (1975). In this context, it is submitted,

error in jury instructions is of constitutional dimension only where the alleged error operates to shift the burden of proof to the defendant and it, when viewed in the context of the entire charge, operates to violate a right guaranteed by the Fourteenth Amendment. See Cupp v. Naughten, 414 U.S. 141, 145-146 (1973).

There is no constitutionally prescribed definition of reasonable doubt and, it is suggested, such definition is best left to the trial courts to develop within the constitutional framework which this Court has provided as, for example, in the area of definition of effective assistance of counsel. See McMann v. Richardson, 397 U.S. 759, 771 (1970).

It is suggested that the First Circuit has taken the appropriate tack in stating

> "Unless this Court is to end up imposing pattern jury instructions, we must tolerate a reasonable range of expression, some or even much of which may not suit our fancy." Bumpus v. Gunther, 635 F. 2d 907, (1980).

Such recognition of the trial court's function is consistent with the teachings of this Court in Cupp v. Naughten, supra at 149.

Although the Supreme Judicial Court did in Commonwealth v. Garcia, Mass. Adv. Sh. (1980) 21, 399 N.E.2d 460 (1980) refer to the jury instruction, using similar analogies, as "constitutionally inadequate," later discussion of the case in Commonwealth v. Grace at 357 indicates that it had in Garcia found the charge as a

whole inadequate, under state law. In the instant case the charge as a whole was held to be adequate particularly in light of the trial courts emphasis on moral certainty.[2/]

Moreover, it should be noted that in the Supreme Judicial Court's passing reference to the instruction in Garcia as being "constitutionally inadequate" the Court referenced the decision of the federal district court in Bumpus v. Gunther, 452 F. Supp. 1060 (1978). However, the district court's

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2/The Court had instructed:

> "But unless after weighing all the pros and cons we come to the conclusion that we are morally sure we are doing the right thing than we don't act.
>
> . . . .
>
> And unless you are sure to a moral certainty that you are doing the right thing, you don't act." (Tr. 1348).

finding that there was constitutional error in the reasonable doubt instruction in that case, did not survive review in the Court of Appeals for the First Circuit.

> "We disagree with the district court's mode of analysis, although not with its end result. In our view, the district court applied a less rigorous standard than was appropriate in deciding whether defects in the charge amounted to "constitutional error," and then rescued the charge by applying harmless error review. This approach resulted in dignifying as "constitutional error" flaws in the court's charge which were not of that level of seriousness, and then, in effect, downplaying the concept of constitutional error by holding that it was harmless." (footnote omitted).
>
> Bumpus at 909.

The Court continued to hold that instructions, including reference to "affairs of life" were not so seriously flawed as to constitute constitutional

error. Thus any underpinning for the state court's reference to constitutional inadequacy has been removed. In any event, a state court's construction of federal constitutional standards is not binding on the federal court. Roy v. Hall, 521 F. 2d 120 (1st Cir. 1975).

It is submitted that neither this nor any other court has held the use of analogies in an instruction on reasonable doubt to be per se unconstitutional.

II. THE MASSACHUSETTS SUPREME JUDICIAL COURT'S DISPOSITION OF PETITIONER'S CASE PRESENTS NO CONSTITUTIONAL CLAIM.

The contention that the Supreme Judicial Court misapplied its own law does not raise a constitutional claim in the absence of a showing of invidious discrimination . Beck v. Washington, 369 U.S. 551, 554 (1909).

> "[T]he 14th Amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions..., any more than, in guaranteeing due process, it assures immunity from judicial error..." Milwaukee E.R. & L. Co. v. Wisconsin ex rel. Milwaukee, 252 U.S. 100, 106 (1920).

Within the procedural context in which petitioner raised his challenges to the jury instructions, by way of a motion for new trial, the disposition of his case was entirely proper. The cases of Commonwealth v. Ferreira, 364 N.E. 2d 1264 (1977) and Commonwealth v. Garcia, 399 N.E.2d 460 (1980) came before the court on direct appeal and the issues were considered under the court's powers pursuant to G.L. c. 278, §33E which brings to the court "the whole case for its consideration of the law and the evidence," and the Court may, "if

satisfied that the verdict was against the law or the weight of the evidence, ... or for any other reason that justice may require," order a new trial or direct entry or a verdict of a lesser degree of guilt. In Ferreira and Garcia the Court exercised that power to review the issue in the absence of an objection or exception. The instant case did not come before the Court under 33E. However, the Court in its discretion reviewed petitioners case to determine whether there was a substantial liklihood that a miscarriage of justice had occurred. The Court noted the factors influencing that decision:

> "... the weight of the evidence, the seriousness of the deficiencies in the instructions taken as a whole, the extent to which the defects had been disclosed in opinions of this Court or of the Supreme Court

> before the instructions were given, the prior opportunities of defense counsel to make the challenge on appeal and in post-conviction proceedings and whether the appeal is subject to the special duty imposed on us by §33E."

Commonwealth v. Grace, at, 417 N.E.2d 357. The Court, as noted above, found the charge as a whole to be adequate within the context of the particular case and in the form in which the issue was presented. Certainly this Court has recognized the distinction between direct and collateral review. See Henderson v. Kibbe, 431 U.S. 145, 154 (1977).

The manner in which the Supreme Judicial Court resolved petitioner's claim clearly involves no constitutional issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

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